

No. 05-723 NOV 1 - 2005

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**IN THE
SUPREME COURT OF THE UNITED STATES**

**DORA SCHIRO, DIRECTOR, ARIZONA DEPARTMENT OF
CORRECTIONS,**

PETITIONER,

-VS-

GARY PAUL CASSETT,

RESPONDENT.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

**TERRY GODDARD
ATTORNEY GENERAL**

**KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION**

**JON G. ANDERSON
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686**

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure bars post-conviction consideration of claims that were waived at trial, on direct appeal, or in any previous collateral proceeding. In *Stewart v. Smith*, 536 U.S. 856 (2002) (per curiam), this Court summarily reversed a Ninth Circuit decision that held that an Arizona trial court's express application of Rule 32.2(a)(3) was not an independent state ground for denying relief. This Court held, based on the Arizona Supreme Court's answer to a certified question, that Rule 32.2 preclusion applies so long as the claim had not been previously raised and does not fall into the narrow category of rights that must be personally waived.

In the instant case, the Ninth Circuit held that determining whether Rule 32.2(a)(3) precludes Respondent's due process claim is a "fact-intensive" inquiry that involves Arizona's "complex law of waiver." The court therefore held that the district court erred in finding Respondent's unexhausted due process claim procedurally barred. The court also ruled that the district court erred in holding, in the alternative, that Respondent's due process claim fails on the merits. According to the Ninth Circuit, a federal habeas court may only dismiss an unexhausted claim on the merits if it is "perfectly clear" that the claim is not "colorable." The questions presented are:

1. Does the Ninth Circuit's refusal to hold that Respondent's due process claim is procedurally barred conflict with this Court's holding in *Stewart v. Smith* and with the Arizona Supreme Court's answer to the certified question in that case?

2. May a federal court dismiss an unexhausted claim on the merits under 28 U.S.C. §2254(b)(2)-which provides that "[a]n application for a writ of habeas corpus may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"-only if it is "perfectly clear" that the claim is not "colorable"?

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OPINIONS BELOW

The opinion of the three judge-panel below is reported in *Cassett v. Stewart*,¹ 406 F.3d 614 (9th Cir. 2005). The official slip opinion is reproduced as Appendix A. The unreported order denying the State's petition for rehearing and petition for rehearing en banc is reproduced as Appendix B.

1. Dora Schriro has replaced Terry Stewart as the Director of the Arizona Department of Corrections, and has been substituted therefor pursuant to Supreme Court Rule 35.3

JURISDICTION

The court of appeals opinion was filed on April 26, 2005. On August 4, 2005, the court issued an order denying Petitioners' motion for rehearing and suggestion for rehearing en banc. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1.

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(b)(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(b)(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

Rule 32.2(a), Arizona Rules of Criminal Procedure, provides:

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

(1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;

(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

STATEMENT OF THE CASE

Cassett was charged with two counts of child molestation and four counts of sexual conduct with a person under the age of 14, stemming from events that occurred with his stepson in November and December of 1990. Although Cassett agreed to plead guilty to kidnapping, a class 2 felony, the trial court at the change-of-plea hearing found an insufficient factual basis for the plea, and Cassett never entered a guilty plea. However, Cassett's attorney had hired John Sloss ("Sloss"), a criminal justice consultant, to prepare an alternative pre-sentence report for sentencing on the guilty plea, which revealed that Cassett had admitted to child molestation. App. A-6.

During a pre-trial hearing, the State disclosed its plan to call Sloss as a witness; the trial court denied Cassett's motion to exclude the testimony. App. A-7. The trial court, however, limited Sloss' testimony to what Cassett said to Sloss. *Id.* Cassett's attorney responded that this ruling "necessarily puts me in the position of having to open the whole issue of [the] plea agreement and sentencing" and noted on the record that he would "approach it from that manner as a point of necessity given the Court's rulings." *Id.* Sloss testified on direct examination by the State that Cassett told him he had pled guilty to oral sex with his stepson. On cross-examination, Cassett's attorney elicited further information from Sloss regarding the guilty plea and the circumstances surrounding it. *Id.*

The jury found Cassett guilty on all counts. The trial court sentenced him to consecutive prison terms of 20 years, 30 years, and four life terms. *Id.*

Cassett appealed his convictions to the Arizona Court of Appeals. Cassett argued that the trial court should have precluded Sloss from testifying about admissions to him by Cassett as Sloss prepared his alternative pre-sentence report, citing Rule 26.6(d)(2), Arizona Rules of Criminal Procedure. While this appeal was pending, Cassett also sought post-conviction relief in the trial court, alleging, in part, that counsel was ineffective in deciding to present evidence of Cassett's

prior guilty-plea proceeding. The trial court denied relief. App. A-7 to 8.

The Arizona Court of Appeals consolidated Cassett's petition from the denial of post-conviction relief with the appeal, and affirmed Cassett's convictions and sentences. It held the trial court did not err in admitting Sloss' testimony because Rule 26.6(d)(2) only applies to pre-sentence reports prepared pursuant to court order, not private pre-sentence reports. It also denied the ineffective assistance claim, finding that counsel's decision to present evidence about the plea negotiations was a reasonable tactical decision and did not prejudice Cassett. Cassett filed a petition for review with the Arizona Supreme Court, which denied review on October 31, 1996. App. A-8 to 9.

On September 2, 1997, Cassett filed a federal habeas petition that included the claim that the trial court violated Cassett's federal due process rights by allowing Sloss to testify that Cassett had pled guilty. App. A-9. The State argued Petitioner had failed to exhaust the claim, but, on April 2, 2001, the district court determined that the claim was exhausted. App. A-9 to 10. On July 31, 2001, the district court held that the state trial court's decision to allow Sloss' testimony and the subsequent revelation of the guilty plea was harmless error, and denied the habeas petition. App. A-10. In a later order, the district court noted that, even if the claim were unexhausted, under 28 U.S.C. § 2254(b)(2), it could deny a habeas application on the merits, notwithstanding the applicant's failure to exhaust remedies in state court. App. A-11.

On appeal, the Ninth Circuit held that "the district court erred in concluding that Cassett adequately exhausted his federal due process claim, and based on this error, improperly reached the merits of Cassett's claim." *Id.* The Ninth Circuit vacated the judgment and remanded with instructions for the district court to dismiss the petition for failure to exhaust state court remedies. *Id.*

On remand, however, the district court dismissed Cassett's petition with prejudice, holding that the due process claim was technically exhausted, and therefore procedurally defaulted; alternatively, under

28 U.S.C. § 2254(b)(2), the court “determined that the claim is without merit.” App. A-11 to 12.

On the subsequent appeal, the Ninth Circuit found the district court could consider if there was a procedural default, but held the district court’s procedural default ruling was erroneous. App. A-14. It acknowledged that the Arizona Supreme Court held in *Stewart v. Smith*, 46 P.3d 1067 (Ariz. 2002), that analysis of whether there was a waiver of the claim without a personal waiver turned on the particular right alleged to have been violated. App. A-14 to 15. But it then stated:

Determining whether a waiver is knowing, voluntary, and intelligent often involves a fact-intensive inquiry. . . . [citations omitted].

Here, the district court did not address whether Cassett’s claim is of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver, nor did it make any factual findings regarding whether Cassett waived his claim. The Arizona state courts are better suited to make these determinations, which may require both a fact-intensive inquiry, and an application of Arizona’s complex case law on waiver. . . . [citation omitted].

Because it is not clear that the Arizona courts would hold Cassett’s federal due process claim barred under Ariz. R.Crim. P. 32.2(a)(3), we conclude that his claim is not procedurally defaulted. [citation omitted]. We therefore reverse the district court’s procedural default ruling.

App. A-15.

The court also held that the district court erred in alternatively ruling that the claim was meritless, ruling that 28 U.S.C. § 2254(b)(2) merely codified this Court’s opinion in *Granberry v. Greer*, 481 U.S. 129 (1987). App. A-16. It then gleaned and adopted the following standard from *Granberry*:

[A] federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise a colorable claim.

App. A-17. Although not addressing the merits of the due process claim, the Ninth Circuit opined "we cannot say that it is perfectly clear that he failed to present a colorable federal claim." App. A-18.

The Ninth Circuit denied the State's petition for rehearing and petition for rehearing en banc. (Appendix B.)